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IN THE
SUPREME COURT OF THE UNITED STATES
October, 1973

No. 73-211

JOHN WAYNE SHELTON,
Petitioner,

-vs-

STATE OF NORTH CAROLINA,
Respondent.

ON WRIT OF CERTIORARI
TO THE NORTH CAROLINA COURT OF APPEALS

BRIEF IN OPPOSITION

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INDEX

		Page
TABLE OF CITATIONS		ii
STATEMENT OF THE CASE		1
ARGUMENT		
I.	THE PETITIONERS RIGHT TO DUE PROCESS OF LAW WAS NOT ABRIDGED BY THE ACTIONS OF THE STATE DURING THE PROCESS OF SELECTING THE JURY.	2
II.	THE PETITIONER WAS NOT DEPRIVED OF DUE PROCESS OF LAW WHEN THE STATE ELICITED TESTIMONY INDICATING THE PETITIONER HAD COMMITTED OTHER CRIMES.	6
III.	PETITIONER WAS NOT DENIED DUE PROCESS OF LAW WHEN HIS CONVICTION WAS BASED UPON THE TESTIMONY FOUND IN THE COURT RECORD.	8
CONCLUSION		10

TABLE OF CITATIONS

CASES:	Page
Babb v. United States, 218 F. 2d 538 (5th Cir., 1955)	5
Carter v. United States, 281 F. 2d 640, Cert. Den 364 U.S. 880, 5 L.Ed. 2d 102, 81 S.Ct. 168 (1960)	6
Claypoole v. McIntosh, 182 N.C. 109, 108 S.E. 2d 433 (1921)	3
Indemnity Company v. Tanning Company, *187 N.C. 190, 121 S.E. 2d 468 (1923)*	3
Nilva v. United States, 212 F. 2d 115 (8th Cir., 1954)	9
State v. Daniels, 231 N.C. 17, 56 S.E. 2d 2, Cert. Den. 339 U.S. 954, 94 L.Ed. 1366 (1949)	3
State v. Duncan, 270 N.C. 241, 154 S.E. 2d 53 (1967)	3
State v. Fowler, 230 N.C. 470, 53 S.E. 2d 853 (1949)	7
State v. Frizzell, 111 N.C. 722, 16 S.E. 2d 409 (1892)	3
State v. Hairston and *State v. Howard* and *State v. McIntyre,* 280 N.C. 220 at 223, 183 S.E. 2d 633 (1971). .	8
State v. Hilton, 271 N.C. 456, 156 S.E. 2d 833 (1967)	3
State v. Jackson, 47 N.M. 415, 143 P. 2d 875 (1943)	5
State v. Jenkins, 234 N.C. 112, 66 S.E. 2d 819 (1951)	3

Page

State v. Kendrick,
9 N.C. App. 688 at 690, 177 S.E. 2d 345 (1970) . 8

State v. Kirby,
3 N.C. App. 43 at 45, 163 S.E. 2d 911 (1968) . . 8

State v. McClain,
240 N.C. 171, 81 S.E. 2d 364 (1954) 7

State v. McNair,
272 N.C. 130 App. 132, 156 S.E. 2d 660 (1967) . 8

State v. Mullins,
233 N.C. 542, 64 S.E. 2d 656 (1951) 3

State v. Parlow,
272 N.C. 60 App. 66, 157 S.E. 2d 688 (1967) . . 8

State v. Roux,
263 N.C. 149, 139 S.E. 2d 189 (1964). 3

State v. Smith and *State v. Shelton*,
17 N.C. App. 694, 695 (1973) 3

State v. Tilley,
239 N.C. 245 at 249, 79 S.E. 2d 473 (1953). . . 8

State v. Wray,
230 N.C. 271, 52 S.E. 2d 878 (1949) 3

Webster v. Commonwealth,
223 Ky. 369, 3 S.W. 2d 754 (1928). 5

MISCELLANEOUS:

24A C.J.S., CRIMINAL LAW §1746 4

24A C.J.S., CRIMINAL LAW §1783 4

Page

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BRIEF IN OPPOSITION

In accordance with Rule 40 (3) of the Rules of the Supreme Court of the United States this Brief In Opposition will not contain: (1) Opinions Below, (2) Jurisdiction, (3) Questions Presented, or (4) Constitutional and Statutory Provisions Involved. Also in accordance with Rule 40 (3) this Brief In Opposition will contain a Statement of the Case in order to correct the Petitioner's Statement of Case.

STATEMENT OF CASE

This is a criminal action in which the Petitioner John Wayne Shalton was tried during the May 8, 1972, Session of the Superior Court of Surry County, the Honorable Walter E. Crissman, Judge Presiding, upon an indictment charging the Defendant with the unlawful, willful and felonious forcing open of a safe. The case was heard on a plea of not guilty. The Petitioner was tried and convicted

by a jury of safecracking, which is a violation of N.C. G.S. 14-89.1. The Petitioner was sentenced to not less than ten (10) nor more than twelve (12) years in the North Carolina Department of Corrections. The Petitioner appealed to the North Carolina Court of Appeals, which Court affirmed the Superior Court of Surry County. Following the action of the North Carolina Court of Appeals, a Petition for Writ of Certiorari was made to the North Carolina Supreme Court. This Petition was denied.

During the selection of the jury the District Attorney indicated that the State contended that Eddie Ray Spivey was a reliable witness. Furthermore, the Solicitor asked if any member of the jury panel "would not under any circumstances take the testimony of an accomplice?" (R p 10). The record as transcribed by the Court Reporter does not contain statements which the defense counsel contends were made by the District Attorney to the affect that Eddie Ray Spivey had plead guilty to the crime to which the Petitioner had been indicted and that Eddie Ray Spivey would testify against the Petitioner.

ARGUMENT

I. THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW WAS NOT ABRIDGED BY THE ACTIONS OF THE STATE DURING THE PROCESS OF SELECTING THE JURY.

The Petitioner contends that the District Attorney, during the opening argument, stated to the jury that the State's witness, Eddie Ray Spivey, came into court and plead guilty to safecracking at Harris Home Center. This contention finds no support in the record other than a statement by Petitioner's counsel (R pp 11-12). The Petitioner further contends that the District Attorney's alleged reference to Spivey's guilty plea constitutes prejudicial and reversible error. The record is clear on this point It reflects that the District Attorney, in the process of selecting the jury, stated to the prospective jurors that Spivey was an accomplice of the Petitioner; that Spivey was a reliable witness; and that if, after scrutinizing his testimony as an accomplice the jury found Spivey's testimony to be truthful, it should give his testimony the same weight as that

of any other witness. The District Attorney than asked if under any circumstances any member of the jury would not accept the word of an accomplice (R pp 10-11).

The law is well settled in North Carolina that where the record is silent on a particular point the silence supports the presumption that the procedure in the Court below was regular and free of error. *State v. Mullins*, 233 N.C. 542, 64 S.E. 2d 656 (1951), *Claypoole v. McIntosh*,182 N.C. 109, 108 S.E. 2d 433 (1921), *Indemnity Company v. Tanning Company*, 187 N.C. 190, 121 S.E. 2d 468 (1923).

In the instant case the Respondent contends that no where in the transcribed court record does it appear that the District Attorney stated that he would "rely in part upon the testimony of one Eddie Ray Spivey, who during this term of Court has plead guilty to this crime and who will testify against the other Defendants in this case and their participation in it." (See Petitioner's Brief pp 6-7). This tact was pointed out and upheld by the North Carolina Court of Appeals in its opinion in this case where that Court stated, "The record does not contain the statement attributed to the Solicitor as the reason given by Petitioner for his Motion for Mistrial, but contains only a statement by Petitioner's counsel as to what the Solicitor said." (*State v. Smith* and *State v. Shelton*, 17 N.C. App. 694, 695 (1973)).

Other North Carolina cases on this point hold that "There is a presumption in favor of regularity. Thus, where the matter complained of does not appear of record appellant has failed to make irregularity manifest." *State v. Hilton*, 271 N.C. 456, 156 S.E. 2d 833 (1967), *State v. Duncan*, 270 N.C. 241, 154 S.E. 2d 53 (1967). Furthermore, it has been held that it is the duty of the Petitioner to see that the record is properly made up and transmitted. G.S. 15-180. *State v. Roux*, 263 N.C. 149, 139 S.E. 2d 189 (1964); *State v. Jenkins*, 234 N.C. 112, 66 S.E. 2d 819 (1951); *State v. Daniels*, 231 N.C. 17, 56 S.E. 2d 2, Cert. Den 339 U.S. 954, 94 L.Ed. 1366 (1949); *State v. Wray*, 230 N.C. 271, 52 S.E. 2d 878 (1949); *State v. Frizzell*, 111 N.C. 722, 16 S.E. 2d 409 (1892).

It is the generally held view that "only matters properly a part of a record so complete as to enable the reviewing Court

intelligently to pass on them may be considered on appeal; and in absence of such a record, ordinarily, the appeal will be dismissed or the judgment affirmed." 24A C.J.S. CRIMINAL LAW §1783. It is further generally held that "arguments and remarks of counsel constitute no part of the record unless made so by some authorized mode." 24A C.J.S. CRIMINAL LAW §1746. The Respondent contends that in this case if the District Attorney did in fact make the statements which the Petitioner ascribes to him, then it was incumbent upon the Petitioner to make sure that the record so indicated the District Attorney's statements. The Petitioner's failure to insure his alleged completeness of the record has the affect of allowing the Appellate Court to review only that portion of the transcript where the Petitioner's attorney alleges statements were made by the District Attorney.

The Respondent contends that due to the fact that the remarks allegedly made by the District Attorney concerning Eddie Ray Spivey do not appear in the transcript, the Court cannot intelligently make a decision concerning the action of the District Attorney.

The District Attorney and the Petitioner's attorney did stipulate to the record on appeal, said record containing the allegation by the Petitioner's attorney that the District Attorney made the alleged remarks concerning Eddie Ray Spivey. However, in light of the merits of the substantive argument made by the Petitioner the specific wording used by the District Attorney in selecting the jury is of utmost importance.

A careful review of the remarks made by the Court (R pp 12-13) wherein the Court set forth the patterned instructions with regard to testimony of an accomplice, indicates that the remarks by the District Attorney were essentially the same as the patterned instructions. These remarks demonstrate that in the opinion of the Court the statements made by the District Attorney in selecting the jury were totally proper and within permissible constitutional limitations due to the fact that they were very similar to the patterned instructions. Therefore, the precise wording used by the District Attorney in selecting the jury is without a doubt crucial, and without this exact wording appearing in the record it is impossible to know precisely what the District Attorney said.

Although the Respondent contends that these remarks allegedly made by the District Attorney cannot be scrutinized on appellate review, the Respondent would still like to point out that in this case Eddie Ray Spivey was a witness for the State and as such was subject to complete, in depth cross examination by the Petitioner. Through this cross examination the Petitioner should have been able to ascertain all information relevant to the Petitioner which witness Spivey had. Through this cross examination the State contends any inadvertent prejudice which had accrued to the Petitioner could have been completely dissipated. In the instant case no previous pleas or statements of witness Spivey were offered as evidence of guilt of the Petitioner. Spivey appeared as the State's witness, testified as to his own guilt, implicated the Petitioner, and was available for and subjected to complete cross examination by the Petitioner.

The Respondent submits that under such circumstances the statements of the District Attorney to the respective jurors, as found in the transcript, were entirely proper and indeed necessary to the selection of the jury since the State's case rested in part upon the testimony of witness Spivey. Denial of the Petitioner's Motion for Mistrial by the Trial Judge therefore was not error.

Under his first Assignment of Error the Petitioner also alleges that he was irreparably prejudiced due to the fact that Eddie Ray Spivey testified that he had plead guilty to a case brought against him the week preceding the Petitioner's trial (R pp 20-21).

The Petitioner cites three cases for the proposition that "A new trial must be granted if an alleged accomplice is allowed to testify over objection that he has plead guilty to the same crime." (See Petitioner's Brief p 9). The Respondent contends that all three cases cited by the Petitioner (*Babb v. United States*, 218 F. 2d 538 (5th Cir. 1955); *State v. Jackson*, 47 N.M. 415, 143 P. 2d 875 (1943), *Webster v. Commonwealth*, 223 Ky. 369, 3 S.W. 2d 754 (1928)) can be distinguished from the instant case in that in all three of those cases there was either no exception made to the infraction or once made the exception was overruled. The Respondent would point out that in the instant case not only did the District Attorney state "strike that" in response to witness Spivey's answer (R p 21), but the Court instructed the members of the jury not to consider the question and indeed indicated that

he would strike it as well (R p 21). A case cited by the Petitioner, *Carter v. United States*, 281 F 2d 640, Cert. Den 364 U.S. 880, 5 L.Ed. 2d 102, 81 S.Ct. 168 (1960), held that prejudicial statements made by witnesses can be cured by prompt and proper instructions by the Court. The Respondent contends in this case the comments by the Court were prompt and proper thereby curing any prejudicial defect.

In addition, the Respondent notes that even had the Court not so instructed the jury, the remark would still not have been prejudicial. This is due to the fact that the District Attorney asked witness Spivey, "I believe that here last week you entered a plea of guilty?" to which the witness replied, "Yes, Sir." (R pp 20-21). No where from this question or this answer does it appear to what crime witness Spivey is stating he plead guilty. To come within the decisions holding prejudicial error the accomplice would have to testify that he plead guilty to the *same* crime as that for which the Petitioner is being tried. From the question and answer in the instant case the jury could not tell the nature of the crime to which he had plead guilty, much less the specific crime to which he had plead guilty.

II. THE PETITIONER WAS NOT DEPRIVED OF DUE PROCESS OF LAW WHEN THE STATE ELICITED TESTIMONY INDICATING THE PETITIONER HAD COMMITTED OTHER CRIMES.

The Petitioner contends that the Court committed reversible error and deprived the Petitioner of his constitutional right to due process when it permitted witness Spivey to implicate Petitioner in other crimes to which witness Spivey had testified on cross examination. Petitioner grounds this contention on the rationale that the other offenses committed by witness Spivey and Petitioner were independent and not connected with the offense for which the Petitioner was tried.

The testimony of witness Spivey reveals that Spivey, Ernest Dale Smith and the Petitioner John Wayne Shelton, conspired to break into the premises of Harris Home Center for the purpose of

stealing money and other valuable goods. The Petitioner in cross examining Spivey elicited testimony which would tend to impair Spivey's credibility (R pp 31-37), including testimony that Spivey had been involved in some forty-five to fifty crimes, that he had recently confessed to these crimes, that he had implicated other persons in these crimes, and that he had testified concerning some of those crimes (R pp 31-32, 34, 35).

On direct examination witness Spivey subsequently testified that he was under indictment in forty to fifty cases and that the Petitioner, John Wayne Shelton, was involved in those cases with him (R p 37). He also testified that Ernest Dale Smith was involved in some of the cases (R p 38).

Although it is the general rule that evidence of offenses separate and independent of the crime with which a defendant is charged is not admissible, this rule is subject to numerous exceptions. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). The Respondent contends that the instant case falls within the exceptions stated by Justice Ervin in *State v. McClain, supra*, at 176 as follows:

> "(6). Evidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission. (citations omitted) Evidence of other crimes receivable under this exception is ordinarily admissible under the other exceptions which sanction the use of such evidence to show criminal intent, guilty knowledge, or identity."

In another North Carolina case, *State v. Fowler*, 230 N.C. 470, 53 S.E. 2d 853 (1949) at page 473, Chief Justice Stacey stated:

> "To this general rule, however, there is the exception as well established as the rule itself, that proof of the commission of other like offenses is competent to show the *quo animo*, intent, design, guilty knowledge or *scienter*, or to make out the *res gestae* or to exhibit a chain of circumstances in respect of the matter on trial, when such crimes are so connected with the

offense charged as to throw light upon one or more of these questions." (citations omitted)

Detective C. G. Cline of the Forsythe Police Department, who was involved in the investigation of some of the crimes in which Spivey was implicated, testified that Spivey was involved in forty cases in five different counties and that the crimes had taken place over a period of nine (9) to ten (10) months (R p 48). The State contends that the evidence given by Spivey and that of Detective Cline " . . . tends to establish a common plan or scheme embracing the commission of a series of crimes . . ." carried out over a period of several months, of which the offense here charged was but one, and that Spivey's evidence of the other crimes tends to establish the *quo animo*, and intent and design of the Respondent. The State submits, therefore that evidence of the other crimes was admissible in the instant case under the above exceptions quoted. *State v. Hairston* and *State v. Howard* and *State v. McIntyre*, 280 N.C. 220 at 223, 183 S.E. 2d 633 (1971).

III. PETITIONER WAS NOT DENIED DUE PROCESS OF LAW WHEN HIS CONVICTION WAS BASED UPON THE TESTIMONY FOUND IN THE COURT RECORD.

The Petitioner contends that it was an error and a denial of due process of law for the Court to deny Petitioner's Motions for a direct verdict of acquittal based on the testimony of witness Spivey.

"It is well settled in this jurisdiction that although the jury should receive and act upon such testimony with caution, the unsupported testimony of an accomplice is sufficient to sustain a conviction if it satisfies the jury beyond a reasonable doubt of the guilt of the accused." *State v. Tilley*, 239 N.C. 245 at 249, 79 S.E. 2d 473 (1953); *State v. McNair*, 272 N.C. 130 App. 132, 156 W.E. 2d 660 (1967); *State v. Parlow*, 272 N.C. 60 App. 66, 157 S.E. 2d 688 (1967); *State v. Kendrick*, 9 N.C. App. 688 at 690, 177 S.E. 2d 345 (1970); *State v. Kirby*, 3 N.C. App. 43 at 45, 163 S.E. 2d 911 (1968).

This is also the rule in Federal Courts and other jurisdictions within the United States. See for example, *Nilva v. United States*, 212 F. 2d 115 (8th Cir. 1954) where it was held that the common law rule that the testimony of an accomplice may be sufficient to warrant a conviction even though it is not corraborated is still recognized. That case holds that a defendant may be convicted of a crime on the uncorroborated testimony of an accomplice if the jury is convinced of the defendant's guilt beyond reasonable doubt. It was also pointed out in *Nilva v. United States, supra*, that in criminal prosecutions it is the jury's province to consider the weight of the evidence and witnesses' credibility.

While the testimony of Eddie Ray Spivey set forth the details of the crime and the involvement of the Petitioner therein, the corpus delicti was established by the evidence of several other of the State's witnesses, principally Mr. Robert C. Harris, President and General Manager of Harris Home Center (R pp 13-15). In addition, testimony given by Mr. Harris and by Chief Willis J. Fulton of the Pilot Mountain Police corroborates witness Spivey's evidence of the manner of breaking into Harris Home Center (R pp 14, 142); the manner of breaking the safe (R pp 14-15, 142); and the tools used for breaking the safe (R pp 14-15, 43).

The evidence of Special Agent, David J. Beale, North Carolina State Bureau of Investigation, corroborates witness Spivey's evidence of the manner of breaking into Harris Home Center (R p 50), and the manner of breaking into the safe (R p 51). The statement read into evidence by Special Agent Jerry Batten, North Carolina State Bureau of Investigation, as to testimony made to him by witness Spivey corroborates witness Spivey's testimony at the trial (R pp 45-46).

The Petitioner in discussing the testimony of witness Spivey states "He was frequently forgetful (See, *e.g.* R pp 28-37) and confused. He could not remember how or when he and his alleged accomplices had gotten together the evening of the crime (R pp 27, 29), the date the crime actually occurred (R p 29), or the physical description of the scene of the crime (R p 30)."

The Respondent points out that it is little wonder the witness Spivey could not remember some of the specific facts surrounding the commission of the crime for which the Petitioner was being tried. This was due to the fact that, as subsequent testimony brought

out, witness Spivey had been involved in forty to fifty crimes of a similar nature within a nine to ten month period. It would seem strange indeed if witness Spivey was able to remember every fact attendant to this specific crime, considering his general inclination and demeanor concerning break-ins at about this time. Rather, considering the witnesses' considerable illegal activities during this time, the Respondent contends that Spivey's "frequently forgetful and confused" testimony adds credulence to his veracity as a witness.

CONCLUSION

The Respondent contends in this case that the Petitioner, John Wayne Shelton, received a fair and impartial trial. In addition, the Respondent contends that there was overwhelming, competent and direct evidence to find the Petitioner guilty as charged with the crime of safecracking and that if there was error, which is not conceded, it was not sufficiently grave to warrant a new trial.

Respectfully submitted.

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